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Nos. 87-1622, 87-1697 and 87-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,
v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,
v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* STANDING ROCK SIOUX TRIBE AND ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the Standing Rock Sioux Tribe are both federally recognized Indian tribes. Both the Fort Peck Reservation (in Montana) and the Standing Rock Reservation (in North and South Dakota) contain a mixture of trust lands and fee lands. The ability to zone Reservation fee lands to protect tribal communities from harmful development is crucial to maintaining the tribal homeland for the future.

The Tribes are also concerned with the wholesale attack on tribal jurisdiction made in this case by the states in which they live. This appears to be an attempt to remove from the Reservations all lands owned by non-Indians, further reducing the homeland guaranteed the Tribes by treaty.

The *amici* Tribes urge this Court to uphold the exclusive zoning jurisdiction of the Yakima Tribe over both the opened and closed portions of its reservation.

All parties have consented to the filing of this brief *amicus curiae*, and those consents have been lodged with the Clerk.

SUMMARY OF ARGUMENT

(I) This case involves the authority of tribes to zone reservation fee lands, where conduct on those lands affects tribal interests. The petitioners and their *amici* argue that a tribe has no jurisdiction to zone fee land on its reservation—that a tribe's powers do not extend to fee lands. This is contrary to this Court's numerous decisions upholding the territorial component of a tribe's jurisdiction, *e.g.*, *United States v. Mazurie*, 419 U.S. 544 (1975).

In *Montana v. United States*, 450 U.S. 544 (1980), the Court expressly recognized a tribe's authority over conduct on fee lands which "threatens or has some direct

effect on the political integrity, the economic security, or the health or welfare of the Tribe." *Id.* at 566. Zoning, where the land of the tribe or its members is threatened or affected by the use of fee land, is precisely authority over such conduct.

Both the Ninth and Tenth Circuits, in which large numbers of tribes are located, have upheld tribal zoning authority. In doing so they have been sensitive to the rulings of this Court and to the local situation. They have understood that non-Indian communities have little interest in protecting reservation lands, and that without the power to zone fee lands on their reservations, tribes would be without any effective remedy to preserve their reservation as a homeland. *See Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982).

(II) Congressional policy, including this year's amendments to the Indian Self-Determination Act, endorses the capabilities of tribal governments and recognizes the necessity of tribal zoning and land use planning to facilitate economic development. The denigration of tribal government by several *amici* supporting petitioners here is not only inappropriate but is inconsistent with Congress' findings and the decisions of this Court.

(III) The *State Amici* seek to reconstrue the legislative history of the Indian Reorganization Act to have the Court view it as insignificant in the strengthening of tribal government and the preservation of tribal governmental authority. Their view is inconsistent with the numerous decisions of this Court construing the Act, with the language of the Act, and with the Act's legislative history. It is true that the original bill would have delegated enumerated powers to the Tribes to the extent determined by the Secretary of the Interior. Those provisions were stricken and in their place was put the current Section 16 which instead preserves *all* existing tribal powers and allowed others to be added. The initial

objections to the Act—which *amici* rely upon—were overcome after President Roosevelt's intervention, and the Act as passed strongly strengthened Indian government and repudiated the policies of allotment and assimilation.

ARGUMENT

I. TRIBES RETAIN CIVIL JURISDICTION OVER ALL LANDS ON THEIR RESERVATIONS WHERE TRIBAL INTERESTS ARE AFFECTED

A. *The Territorial Component of Tribal Sovereignty is Firmly Established by the Rulings of This Court.*

Much of the argument by petitioners and their supporting *amici* consists of their reading of certain language from *Montana v. United States*, 450 U.S. 544 (1980). But the decisions of this Court both before and after *Montana*, and *Montana* itself, recognize tribal civil jurisdiction over non-Indian activities on reservation lands—whether trust or fee—which significantly affect tribal interests.

In *United States v. Mazurie*, 419 U.S. 544 (1975), a unanimous Court upheld tribal authority to regulate the sale of liquor *by non-Indians on fee lands* on an Indian reservation. *Mazurie* arose on the portion of the Wind River Reservation which was open to non-Indian settlers and checkerboarded, much like the open area at Yakima. The Tenth Circuit had ruled that Congress could not delegate to the Tribes licensing authority over liquor sales on fee lands, because the Tribes were mere landowners, lacking authority over fee lands. In wholly rejecting this argument Justice Rehnquist wrote:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus it is an important aspect of this case that Indian tribes are unique aggregations pos-

> sessing attributes of sovereignty over both their members and their territory.

Id. at 557 (citations omitted).

The Court has reaffirmed the territoriality of tribal jurisdiction in numerous decisions. As the Court stated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980), "there is a significant geographical component to tribal sovereignty." [1]

In a broader sense, the Tribes' territorial powers in civil matters are part of the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).[2] These retained powers have been consistently upheld as

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[1] The lands at issue are *on the Reservation*. No claim is made—nor could one be—that these lands are off the Reservation. Nevertheless, petitioners and their supporting *amici* suggest that the Court treat these lands as if they were no longer within the Reservation or subject to any tribal jurisdiction. Their argument—in effect that fee lands are per se not to be treated as reservation lands—has been rejected continuously by the Court for over 75 years. *See United States v. Celestine*, 215 U.S. 278, 285 (1909). While under the allotment policy, now repudiated, the United States allowed non-Indians to purchase land within reservations, unless Congress unequivocally provided otherwise, those purchased lands remain within the reservation. *E.g., Mattz v. Arnett*, 412 U.S. 481, 498-99 (1973).

[2] In addition to express congressional limitations on tribal authority, tribes have been implicitly divested of their criminal jurisdiction over non-Indians by virtue of their status as domestic dependent sovereigns. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). *Oliphant* relied on the "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians . . . ." 435 U.S. at 206. With respect to civil jurisdiction, the Court has consistently found the common understanding of the three branches of Government to be precisely the opposite. *See National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 854-55 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-147 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980).

to civil jurisdiction over non-Indian conduct on the reservation, *e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (hunting and fishing); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (severance taxation); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (sales taxation). This has been so where the conduct was on fee land. *United States v. Mazurie*, 419 U.S. 544 (1975) (individually owned fee land); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) (fee land owned by school district). As this Court recently stated, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (citations omitted):

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.[3]

Nor is this anything new. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 140 (quoting from an *1879* Senate Report describing broad civil powers of Indian tribes); *Buster v. Wright*, 135 Fed. 497 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) (upholding tribal authority to tax non-Indians on reservation fee lands); *The Powers of Indian Tribes*, 55 I.D. 14, 55 (1934) (defining the broad civil authority of tribes preserved by the Indian Reorganization Act.)[4]

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[3] The ruling in *LaPlante* did not turn on whether the underlying incident involved trust or fee lands. *LaPlante* involved an injury in an automobile accident allegedly occurring on a federal highway on the reservation. The District Court made no findings—and neither the Ninth Circuit nor this Court commented on—the fee or trust status of the accident site. The lower court opinions are unpublished but were printed in the appendix to the petition for writ of certiorari in *Iowa Mutual Ins. Co. v. LaPlante*.

[4] Thus, it has long been clear that, for jurisdictional purposes, people living on fee lands within Indian reservations are not in

B. Montana v. United States *Supports Tribal Zoning Authority.*

Montana must be read within the context of this Court's other rulings, both before and after it. Viewed in this manner, *Montana* teaches that Indian tribes have civil jurisdiction over non-Indian activities on reservation fee lands where the non-Indian activities threaten or affect Indian governmental, property or other interests. Where Indian interests are not implicated—as the Court found to be the case in *Montana*—tribes do not have civil jurisdiction over non-Indians on fee lands. This Court and the lower courts have consistently read *Montana* this way. No court has ruled—as petitioners invite here—that *Montana* was the death knell of tribal civil jurisdiction over non-Indians.

In *Montana*, the Crow Tribe sought to prohibit non-Indian hunting and fishing on certain fee lands. The Court stated that "[t]he complaint in this case did not

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the same situation as people living off reservations. They cannot sell liquor on their land without the consent of the tribe. *United States v. Mazurie*, 419 U.S. 544 (1975). Crimes committed on their land, if they involve an Indian, may be handled in federal courts. 18 U.S.C. 1151-1152; *see* Cohen's *Handbook of Federal Indian Law* (1982 ed.) ("Cohen"), pp. 286-287. Civil suits involving events that occur on such lands may be tried in Tribal Courts. *Williams v. Lee*, 358 U.S. 217 (1959) (non-Indian as plaintiff); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (non-Indian as defendant).

On the other side of the ledger, the non-Indians who purchased reservation lands obtained considerable benefits in this arrangement. They were able to obtain land free or well below market price. *E.g., Citizens Band of Potawatomi v. United States*, 14 Ind. Cl. Comm. 570, 580 (1964) (Docket 96); *Sac and Fox Tribe v. United States*, 18 Ind. Cl. Comm. 558, 616, 631 (1967) (Docket 219). They were and are able to use irrigation systems built for the Indians. *See* Cohen, pp. 728-732. They were often able to obtain permits to use large areas of federal land or lease Indian lands at concessionary rates, thus expanding small farms or ranches into effectively much larger ones.

allege that non-Indian hunting and fishing on reservation lands has impaired" the Tribes' treaty right to hunt and fish. *Montana*, 450 U.S. at 558 n.6.[5] In these circumstances—where there was *not even an allegation* that the non-Indians were in any measure affecting any Indian interests—the Court held the Tribe lacked authority to bar non-Indians from hunting and fishing on fee lands.

At the same time, the Court in *Montana* reaffirmed that tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565. This includes civil jurisdiction over nonmembers who enter "contracts, leases, or other arrangements" with the Tribe or Indians. *Id.* In addition, tribes retain civil authority over non-Indian conduct on reservation fee lands which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." *Id.* at 566.

Montana, then, means that where a significant tribal interest is threatened, or directly affected, the tribe may regulate the on-reservation conduct of non-Indians, on trust lands or fee. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331, n.112 (1983); *Washington v. Confederated Tribes*, 447 U.S. 134, 152 ("tribes possess a broad measure of civil jurisdiction over the activities of non Indians on Indian Reservation lands in which the tribes have a significant interest."). Indeed, this Court has cited *Montana* for the proposition that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

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[5] The complaint moreover "did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe." *Id.* at 566.

C. *The Courts of Appeals Have Properly Recognized The Need for Tribal Zoning of Reservation Fee Lands.*

Tribal regulatory jurisdiction over fee land on a tribe's reservation is essential to protect the use of the tribal land. Only the Tribe has an interest in protecting the reservation as a homeland for its people. To the non-Indian governments, the reservation is a place of less than normal concern, in part because of the sweep of federal jurisdiction. To the tribe it is everything.

The Courts of Appeals have consistently applied *Montana* to preserve this much-needed aspect of tribal civil jurisdiction over reservation fee lands. For example, in *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982), the Tenth Circuit upheld the application of a tribal zoning ordinance to fee lands on the checkerboarded Wind River Reservation. *While the county had land use regulations*, those regulations did not stop a non-Indian from subdividing land into an 132 lot trailer park in the midst of a rural Indian community. The county's interest apparently was to allow "development"—even this haphazard development, which was proposed without adequate provision for fire, garbage and other necessary services. Only the Tribes had an interest in preserving the integrity of the rural Indian community.

Without the power to zone, tribes would be without any effective remedy to keep non-Indians from turning their reservations into places for cheap subdivisions, dumps and land speculation. As the Tenth Circuit recognized in *Knight*, under this Court's rulings, including *Montana*, tribal governments are not powerless to prevent such a result. *See also Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982), *cert. denied* 459 U.S. 967 (1982) (in which the Ninth Circuit upheld a tribe's authority to regulate a grocery store on reservation fee lands which

was a fire hazard and threatened rodent contamination of food).[6]

The Ninth Circuit in this case applied *Montana* consistently with other decisions of this Court and the courts of appeals.[7] The Yakima Nation enacted its zoning ordinance in 1970 and has ruled on hundreds of land use applications. The Court of Appeals upheld tribal authority to zone fee lands in both the closed area (comprised of largely undeveloped trust lands) and the open area (a checkerboard of trust and fee lands) of the reservation. The Court stated that in

> enacting zoning ordinance[s], a tribe attempts to protect against the damage caused by uncontrolled development, which can affect all of the residents and land of the reservation. Tribal zoning is particularly important because of the unique relationship of Indians to their lands. 828 F.2d at 534.

With respect to both portions of the reservation, the Court noted the Tribe had significant interests which could be impaired by the proposed development—including harm to lands through erosion, harm to the tribal way of life through increased population density, harm to tribal governmental interests by requiring additional police or fire services, as well as harm to tribal religious interests in sacred burial grounds near the planned de-

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[6] *See also Lummi Indian Tribe v. Hallauer*, 9 Indian Law Reporter 3025 (W.D. Wash. 1982), in which the district court upheld the Lummi requirement that non-Indian owners of fee land, as well as Indians, use the new tribal sewer disposal system; *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied* 459 U.S. 977 (1982) upholding, *inter alia*, the Flathead Tribes' regulation of piers and sewer discharge into Flathead lake from fee land as well as trust.

[7] These rulings also show that tribes have exercised their powers with restraint. Both the Yakima ordinance here, and the Shoshone and Arapahoe ordinance in *Knight*, did not seek to zone non-Indian communities on the reservation.

velopment. *Id.* at 535 and 536 n.5. These tribal interests were found sufficient to sustain tribal zoning.

This case is factually unlike *Montana*—in which no impact on tribal interests was alleged. Rather, this is a case in which core tribal interests—the Tribe's ability to preserve its resources and the character of its reservation homeland—are at stake. The court below, following the teachings of this Court, properly held that the Tribe retains the power to zone as necessary to protect those interests.[8]

II. CONGRESSIONAL POLICY—AS DEMONSTRATED BY THE RECENT AMENDMENTS TO THE INDIAN SELF-DETERMINATION ACT—SUPPORTS TRIBAL ZONING AUTHORITY

South Dakota (Br. pp. 2-12) and certain other *amici* use their briefs to denigrate tribal government. Congress does not share their views.

This Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). Federal Indian policy "includes Congress' overriding goal of encouraging 'tribal self sufficiency and economic development' . . . ." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983), quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Tribal authority over on-reservation conduct must be "construed generously in order to comport . . . with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

Action at the close of the 100th Congress confirms both that federal policy recognizes the capabilities of tribal

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[8] With respect to the open portion of the Reservation, the Ninth Circuit remanded for a determination of whether off-reservation impacts could justify county zoning.

government and supports tribal zoning and land use planning. Within the past month, one of the cornerstones of federal Indian policy, the Indian Self-Determination Act, 25 U.S.C. 450 *et seq.*, has been amended to expand governmental opportunities for tribes and to enhance reservation economic development. Indian Self-Determination Amendments of 1987, Pub. L. 100-472, 102 Stat. 225 (October 5, 1988). The original Self-Determination Act —enacted in 1975—was designed to allow tribes to assume increased responsibility for federal Indian programs. The amendments, among other things, expand the scope of federal programs which tribes may administer (Section 201(a)), clarify that funds available for tribally-run programs are not to be arbitrarily diminished (Section 205), remove indirect cost penalties (Section 205), and broaden the availability of technical assistance to tribes (Section 202).

In seeking to further the tribal self-determination policy, Congress noted the progress tribes have made over the past decade, and expressed confidence in tribal governmental capabilities. As the Senate Report on the bill which became the Self-Determination Amendments states:

> *Indian tribal governments have developed rapidly since passage of the Indian Self-Determination Act.* In addition to operating health services, human services, and basic governmental services such as law enforcement, water systems and community fire protection, *tribes have developed the expertise to manage natural resources and to engage in sophisticated economic and community development.* All of these achievements have taken place during a time when tribes have also developed sophisticated systems to manage and account for financial, personnel and physical resources. Most Indian communities share with rural non-Indian communities problems of inadequate infrastructure and lack of access to managerial talent. Nevertheless, *compared to state, county and municipal governments of similar demo-*

> *graphic and geographic characteristics, the level of development attained by tribal governments over the past twelve years is remarkable.* This progress is directly attributable to the success of the federal policy of Indian self-determination.

S. Rep. No. 274, 100th Cong., 1st Sess., p. 4 (Emphasis added).

The Act also reflects Congress' determination that strong tribal governmental authority and reservation economic development are related goals which must advance together.

> The obvious conclusion is the same for Indian and non-Indian rural communities: the development of local government services, the provision of supportive human services, and local planning are essential to successful economic development. The Indian Self-Determination Act has made these conditions possible on many Indian reservations. *Id.* at 5.[9]

More specifically, Congress recognized that tribal self-determination contracts are appropriately used to produce tribal land use and zoning ordinances, which in turn promote tribal economic development efforts.

> Tribal self-determination contracts to conduct comprehensive planning, *land use studies* and natural resource inventories have been essential to the success of Indian economic development efforts. *Id.* at 4-5. (Emphasis added.)

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[9] This is also reflected in the Act's declaration of policy, which was amended to include the following language (Section 102):

> In accordance with this policy, *the United States is committed to supporting and assisting Indian tribes in* the development of strong and stable tribal governments, capable of administering quality programs *and developing the economies of their respective communities.* (Emphasis added.)

Likewise, in discussing the provision authorizing expanded technical assistance, the Senate Report states:

> Not only will such interaction [between Tribes and entities other than the federal government] lead to improved program planning, it could also lead to improved intergovernmental cooperation when tribes obtain technical assistance from local government sources in such areas as *zoning ordinances*, environmental quality planning, and other technical areas. (Emphasis added.) *Id.* at 28.[10]

In short, Congressional policy of promoting tribal government as a means toward Reservation economic development has recently been reaffirmed. In specifically addressing tribal land use planning and zoning, the Senate Committee which reported the measure indicated that these are important tools for Tribes in achieving the congressionally sanctioned goal of improving their economic status. Thus congressional policy would be furthered by upholding tribal zoning authority in this case. In the end, Congress' expression of Federal Indian policy, not certain *amici's* attempts to undermine that policy, must control.

III. THE INDIAN REORGANIZATION ACT OF 1934, CONTRARY TO THE POSITION OF THE *STATE AMICI*, RECOGNIZED BROAD INHERENT TRIBAL GOVERNMENTAL AUTHORITY INCLUDING AUTHORITY OVER NON-INDIANS ON INDIAN RESERVATIONS

This Court often has reviewed the Indian Reorganization Act (IRA), ruling time and again that the IRA confirmed broad tribal governmental powers, based on

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[10] Note that this language treats tribal zoning in the same manner as environmental quality planning, which tribes are authorized to regulate on all reservation lands, both trust and fee. Clean Water Act, 33 U.S.C. § 1377; Safe Drinking Water Act, 42 U.S.C. § 300j-11; Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. § 9626 *et seq.*

inherent tribal authority.[11] *State Amici*[12] nevertheless contend (Br., III) that the Indian Reorganization Act of 1934 somehow limited tribal governmental powers, particularly over non-Indians. This is clearly not so.

It is true, as *State Amici* note (Br., p. 10), that the final Act was a very substantial rewrite of the bill originally proposed by the Interior Department. *State Amici* speculate from some comments during the hearings on the original bill that the purpose of this revision was to limit tribal powers over non-Indian residents of reserva-

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[11] *E.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (The "Federal Government's longstanding policy of encouraging tribal self-government . . . ." is embodied in the IRA); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 199 (1985) ("The 73d Congress, in passing the IRA to advance tribal self-government, see *Williams v. Lee*, 358 U.S. 217, 220 (1959), did nothing to limit the established, preexisting power of the Navajo to levy taxes"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (IRA among "a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development."); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 168 (1980) (The "strong and oft-cited policy of encouraging tribal self-government" and the "complementary interest in stimulating Indian economic and commercial development", "[b]both found expression in the Indian Reorganization Act . . . ."") (citations omitted); *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (IRA "recognized that Indian tribes already had such power [the power to try Indian offenders] under 'existing law.' *See* Powers of Indian Tribes, 55 I.D. 14 (1934)"); *Fisher v. District Court*, 424 U.S. 382, 387 (1976) (IRA is "a statute specifically intended to encourage Indian tribes to revitalize their self-government."); *Morton v. Mancari*, 417 U.S. 535, 542-43 (1974) ("The overriding purpose of that particular Act [IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically. . . . The solution ultimately adopted was to strengthen tribal government . . . .").

[12] Ten states (*Arizona, et al.*) have jointly filed an *amicus* brief in this case. We refer to these as the "*State Amici.*"

tions. This conjecture is contrary to both the language and legislative history of the Act.[13]

The key language of the Act concerning tribal government authority, as *State amici* concede (Br., p. 16), is in Section 16, 25 U.S.C. § 476. That section in pertinent part, reads:

> *In addition to all powers vested in any Indian tribe or tribal council by existing law,* the constitution adopted by said tribe shall *also* vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. (Emphasis added.)

"Existing law" in 1934 confirmed tribal powers to tax and civilly regulate activities by non-Indians. This Court had expressly so held in *Morris v. Hitchcock*, 194 U.S. 384 (1904). And this tribal governmental authority over non-Indian activities had been held to extend to lands owned by non-Indians in fee within a reservation. *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). In 1934, it was also clear that tribes possessed these governmental powers as part of their inherent sovereignty, and not as powers granted or delegated to them by the United States. This Court had so held in *Talton v. Mayes*, 163 U.S. 376 (1896), dealing with the authority of the Cherokee tribal court.

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[13] Throughout this discussion, references to "Senate Hearings" are to Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d sess. (1934), and references to "House Hearings" are to Hearing on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d sess. (1934).

The Interior Department draft bill introduced in February 1934 would have entirely *changed* the status of tribes: by making tribes federal municipal corporations, instrumentalities of the United States—rather than inherent sovereign entities. *See, e.g., Note, Tribal Self-Government and The Indian Reorganization Act of 1934*, 70 Mich. L.Rev. 955, 962 (1972) (hereafter "Michigan Note").

BIA Commissioner Collier stated at the opening of the House hearings, "the bill curbs Federal absolutism and provides Indian Home Rule *under Federal guidance.*" House Hearings, p. 18 (emphasis added). Throughout their extensive consideration of the bill from February through May, 1934, members of both the Senate and House Committee complained that Interior's bill contained so much "Federal guidance" that it retained the "Federal absolutism" that the Commissioner stated he wished to curb. Title I of the Interior bill as originally introduced, would have authorized the Secretary of the Interior to issue a charter to any Indian tribe "*granting*" that tribe "any or all . . . powers of government" enumerated in the bill as seen fit by the Secretary. S. 2755 and H.R. 7902, 73d Cong., 2d Sess., Title I, §§ 2, 4.[14] The Secretary would have had discretion over which powers to grant tribes, and which to withhold.[15] Moreover, all tribes would have been subject to the Act, whether they wished to be covered or not.

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[14] The original bill is App. A to the *State Amici*'s brief.

[15] BIA Commissioner Collier repeatedly and unsuccessfully urged that "this discretion is only a tithe of the existing discretion which the bill curbs" and that "the grant of discretion was necessary because in no other way can the variety of conditions be met. Flexibility is necessary." *E.g.*, House Hearings, p. 47, Commissioner's statement (starting the second day of hearings). As their subsequent statements and actions show, congressional leaders were unconvinced and substantially changed the bill, among other reasons, to eliminate this federal control.

The bill also contemplated establishing a new federal Court of Indian Affairs under Title IV. This Court would have had jurisdiction "[o]f all cases at law or in equity arising out of commerce with any Indian tribe . . . or members thereof, wherein a real party in interest is not a member of such tribe . . . " as well as certain other cases including those to which any tribe is a party. Title IV, § 3(3). This Court of Indian Affairs could order the removal to itself of *any* pending tribal court cases, Title IV, § 5, and would hear appeals of all tribal court decisions, Title IV, § 6.

These and other features of the bill—particularly those features that represented compulsory Interior Department and federal control over tribes—were strongly resisted by members of both the Senate and House Committees on Indian Affairs, and by some tribes. Indeed, it seemed likely by late April that the entire bill would be rejected.[16]

On April 28, however, President Roosevelt intervened by letter to both Committee Chairman, *see* 78 Cong. Rec. 7959 (May 1, 1934); House Hearings, p. 233; Senate Hearings, pp. 145-46. The President's advocacy as to the importance of the bill, and his power and prestige at this

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[16] This is particularly apparent from a colloquy at the Senate Committee on Indian Affairs hearing that opened on April 30 between the principal participants in the Senate hearings—Committee Chairman Wheeler of Montana, Senator Ashurst of Arizona and Senator Thomas of Oklahoma.

Senator Ashurst stated that "[i]t is well known I am opposed to the bill . . . —the most important Indian bill ever brought before Congress during my service." He moved that a subcommittee be appointed to review the bill. Senate Hearings, pp. 143-144.

A colloquy then ensued where each of the three Senators expressed doubts about the bill. (*Id.* at pp. 114-145.) This colloquy is quoted in part by *State Amici* in their brief, p. 12, n.8. As noted, *infra*, however, President Roosevelt's intervention changed this viewpoint and convinced the opponents to support and enact the final bill, as modified.

early point in the New Deal, apparently convinced both Committees to support the bill,[17] but only after working with the Administration in extensively rewriting it, so much so that—as Congressman Howard, Chairman of the House Indian Affairs Committee, told the House—"the original bill would not recognize this as its own child." 78 Cong. Rec. 12164.

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[17] The context of the Senate Committee's consideration of the bill was dramtically changed, when, during the colloquy referred to in note 16 and relied upon by *State Amici*, Chairman Wheeler informed his colleagues:

> I received a letter from the President Saturday in which he gave whole-hearted support to the bill and said that he was very anxious that the bill should be passed at this session of Congress. I am anxious not to delay the consideration of it but to try and get something worked out that can be worked out that might be satisfactory to the Senator from Arizona and to the different Senators. I think something can be worked out of this bill. In its present form I think it has many objectionable features, but my idea is that we can work out something . . . ."

Senate Hearings at 145-146.

A subcommittee proved unnecessary, because on May 17, Chairman Wheeler announced that, after he met with BIA Commissioner Collier, the Interior Department produced a new "bill, which eliminates, it seems to me, practically all of the matters that are in controversy . . . ." *Id.* at 237. The House Committee went into executive session beginning May 9, and evidently rewrote the bill between then and May 17, in conjunction with Commissioner Collier. House Hearings, pp. 497, 502-503. With some further technical modifications by the Senate Committee and on the Senate floor, this modified bill was enacted.

In addition to persuading Chairman Wheeler to develop a modified, compromise bill (discussed *supra*), President Roosevelt's personal intervention was also seen as critical to passage of the bill by several Congressmen. 78 Cong. Rec. 11732 (Rep. Howard); 11743 (Rep. Frear). House Committee Chairman Howard's disclosure of the same letter to his Committee on May 1 persuaded committee members that the President really did support the purposes of the bill, and had not earlier "given his endorsement in a haphazard way . . . wholly unaware of the real purport of the bill." House Hearings, p. 234.

Title IV, which provided a separate Court of Indian Affairs, was completely removed, leaving tribal courts free to operate without federal interference. As noted, instead of tribes being "granted" those governmental powers enumerated at great length in Title I at the sufferance of the Department, Section 16 of the final Act, 25 U.S.C. § 476, confirmed all powers held by tribes "under existing law." [18] And Section 18 of the bill, 25 U.S.C. § 478, gave tribes the option of voting to be excluded from the Act's provisions, which included adoption of a modern constitution.

The explanations given by the two Committee Chairmen—Senator Wheeler and Congressman Howard—and other committee members when they presented the revised bill on the floors of the two houses, confirm that the dominant purpose of the Committees' revisions was to free Indians from the heavy bureaucratic control of the Interior Department contained in the Department's original draft. Congressman Howard, for example, explained the situation as follows:

> . . . [I]n reality the Indians can only be described as Federal peons.
>
> Although many thousands of Indians are living in tribal status on the various reservations, their own native tribal institutions have very largely disintegrated or been openly suppressed, and the entire management of Indian affairs has been more and more concentrated in the hands of the Federal Indian Service. *The powers of this Bureau over the property, the persons, the daily lives and affairs of the Indians have in the past been almost unlimited. It has been an extraordinary example of political absolutism in the midst of a free democracy*—absolutism built up on the most rigid bureaucratic lines,

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[18] This language was in both redrafts considered by the Committees after the President's intervention—Section 9 of the Senate bill and Section 17 of the House bill. It became Section 16 of the Act. 25 U.S.C. § 476. *See* H.R. Rep. No. 2049, 73d Cong., 2d Sess., (1934) p. 8 (Conference Report).

> irresponsible to the Indians and to the public; shackled by obsolete laws; resistant to change, reform, or progress; . . . .
>
> * * * *
>
> . . . It is perfectly clear that the Indian, in order to win a secure and self-respecting position in our American community, *must have not only economic security and the chance of self-support, but must also have constant practice in civic affairs and in the management of property and business.* The system of guardianship hither to in effect has deprived the Indian of this practice.

78 Cong. Rec. 11729 (Emphasis added).

Congressman Howard summarized "the ultimate goals of the policy embodied in this bill" as including:

> seek[ing] the functional and tribal organization of the Indians so as to make the Indians the principal agents in their own economic and racial salvation, and . . . progressively reduce and largely decentralize the powers of Federal Indian Service. In carrying out this program, the Indian Service will become the adviser of the Indians rather than their ruler . . . . [T]he new policy will constantly strengthen the Indians, rather than weakening them."

Id. at 11732.

Senator Wheeler explained the bill in similar fashion to the Senate. Senator King of Utah stated (evidently referring to the Interior Department's original draft):

> I have been told that this bill may perpetuate the Indian Bureau, and that the Indian Bureau has been very anxious for a measure of this character . . ."

Senator Wheeler responded:

> Let me say to the Senator there is not a provision in this bill which superimposes upon the Indians bureaucratic control from Washington. On the contrary, this bill proposes to give the Indians an opportunity to take over the control of their own resources

> and fit them as American citizens. The bill as it originally came from the Department had many objectionable features, which were eliminated from it.

Id. at 11124.

As noted, the "objectionable features" (*see State Amici* Br., p. 16) the Committees "eliminated" from the bill were mainly in Title I and Title IV. As finally presented, the rewritten bill, with deletion of the extensive federal control over tribal governments contained in the original bill, and tribal option as to whether to come under most provisions of the Act, was unanimously passed by the Senate, *Id.* at 11139—and unanimously supported by the House Committee on Indian Affairs. *Id.* at 11732. Even so, some members of the House opposed the final bill as retaining too much power in the Interior Department over tribal governmental decisions. *Id.* at 11734 (Rep. Beiter), 11736-37 (Rep. Carter).

The strengthening of tribal governmental authority and lessening of federal control in the final bill were seen by its congressional supporters as an important "reversal of established policy." *E.g.*, 78 Cong. Rec. 11743 (Rep. Frear).[19] As Congressman Howard said (characterizing the provision that became Section 16 of the Act): "[t]he psychological and moral effects of these provisions for Indian incorporation and home rule are bound to be far-reaching." *Id.* at 11731.

The complete legislative history of the Act, as well as its language, overwhelmingly reject *State Amici's* characterization of its purpose and support prior holdings of this Court. *State Amici* rely upon isolated, often out of context statements—usually made before President Roosevelt's personal intervention with the Committees changed the minds of key members.[20] The Indian Reor-

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[19] As the Michigan Note concludes "every section [of the IRA] in some way affects tribal self-government." 70 Mich. at 964.

[20] For example, Senator Wheeler's statement (*State Amici* Br., p. 15) that "you are going entirely too far * * * in letting those

ganization Act changed its method—from delegations of enumerated authority to preservation of *all* existing authority—but kept its same purpose and effect as a dramatic strengthening of tribal governments and a reversal of earlier destructive policies.

CONCLUSION

The court below properly followed this Court's rulings. With regard to the closed portion of the Reservation, it upheld exclusive tribal zoning authority. As to the open portion, the court below upheld tribal power to zone fee lands, and remanded for a determination of whether *off-reservation* county interests could justify superimposing county zoning on the Tribe's regulatory scheme. The ruling of the court below should be affirmed.

Respectfully submitted,

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tribes set up rules and regulations," Senate Hearings, p. 199, was his reaction to Title IV's proposal to create a separate federal Court of Indian Affairs, and give that Court authority to remove cases concerning *off-reservation* transactions involving Indians *from state courts, see* Senate Hearings, p. 198. His comments on Indian government were to the concept of chartered communities. Similarly, Commissioner Collier, the chief Interior witness testifying in support of the bill, made the statement quoted by *amici* (*State Amici* Br., p. 16) that non-Indians would "kick like steers" if the Federal Court of Indian Affairs—which Collier supported *as did Congressman DePriest, with whom he was talking*—were enacted. The special federal court, of course, was not enacted, and Title I was changed to support inherent tribal governmental authority rather than making tribes creatures of authority delegated by the Secretary of the Interior.